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NAH v HAH

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO WA-24F-141-04 OF 2022
EVROL MARIETTE PETERS J
17 JUNE 2024

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Family Law — Children — Custody — Welfare of children — Doctrine of 'tender years' — Plaintiff filed application for sole custody, care and control of youngest child — Defendant counterclaimed for sole custody, care and control of second and third children of marriage — Whether defendant had rebutted presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976

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— Whether plaintiff was unfit to assume custody, care and control of children — Whether children should have been interviewed — Whether parties should have sole or joint custody of children — Whether parties entitled to access to children — Whether child maintenance should be awarded — Guardianship of Infants Act 1961 s 11 — Law Reform (Marriage and Divorce) Act 1976 ss 88(2),

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(3), 92, 93 & 100

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The plaintiff-wife and the defendant-husband were married in 2006 and were blessed with three children, namely two sons VIN and HIN, and a daughter LIN. The marriage was, however, progressively deteriorated leading to a contentious custody battle between the parties as well as multiple applications being filed by the defendant. The defendant managed to obtain a court's order for the custody, care and control of the children but the said order was set aside due to non-service of the cause papers on the plaintiff. The children, however, were not returned to the plaintiff and remained in the care and control of the defendant. The plaintiff then filed the present applications for sole custody, care, and control of the youngest child of the marriage; and for the first and second children to be interviewed by the court to ascertain their wishes regarding custody and access. The defendant, on the other hand, counterclaimed for sole custody, care, and control of the second and third children of the marriage. In addition, the defendant filed an application under s 100 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') for the plaintiff to undergo a psychiatric evaluation and the necessary treatment before the court arrived at a decision on the issues of custody and access to the children in the applications and counterclaim. The issues to be determined by the court were: (a) whether the defendant had rebutted the presumption in s 88(3) of the LRA — in relation to this issue, the defendant submitted: (i) that the plaintiff's compromised mental and emotional well-being rendered her unfit to assume custody, care, control, or even unsupervised access to the children; and (ii) that, with regard to LIN's current environment, the defendant strongly argued

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against any disruption, contending that uprooting LIN and separating her from her siblings would not be in the best interest of her welfare; (b) whether the children should have been interviewed; (c) whether the parties should have sole or joint custody of the children; (d) whether the parties entitled to the access to the children; and (e) whether child maintenance should be awarded.

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Held:

- (1) Given that LIN was only four years old at the time of the hearing, the doctrine of 'tender years' was applicable. This legal principle, historically used in custody cases, asserted that young children, particularly those of tender years, were best cared for by their mothers. This doctrine was outlined in s 88(3) of the LRA. It was incumbent upon the defendant to rebut, on a balance of probabilities, the presumption in s 88(3) which inherently favoured the plaintiff. This legal presumption placed the burden on the defendant to provide compelling evidence to counter the assumption that the plaintiff was the most suitable guardian for LIN (see paras 15 & 20).
- (2) The plaintiff's psychiatric report showed that the plaintiff was perfectly normal, and she was not suffering from any mental or emotional illness. Further, the report pertaining to LIN showed that, contrary to the defendant's claim, LIN maintained a positive and healthy relationship with the plaintiff. This positive relationship was crucial for LIN's development and overall mental health. Thus, the evidence strongly supported the conclusion that the plaintiff was capable of fostering a healthy and supportive atmosphere for LIN (see paras 23 & 28–29).
- (3) There was no doubt that the welfare of the children remained the paramount consideration for the court. This fundamental requirement was enshrined not only in s 11 of the Guardianship of Infants Act 1961 but also in s 88(2) of the LRA. Regarding LIN's current environment, due to the prolonged and contentious dispute between the parties, it could not be stated that LIN had been consistently residing with the defendant. Further, the court should not allow the defendant to benefit from the delay that he caused in filing of the applications and counterclaim, and the focus should remain on the best interests of the children, irrespective of the current circumstances shaped by the defendant's actions. Regarding the separation of LIN from her brothers, the children would spend significant amounts of time together during the access periods allocated to each party by the court. The approach taken by the court balanced the need to keep the siblings connected while addressing the unique circumstances presented by the considerable age gap between LIN and her brothers. Finally, the court

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- A opined that, the bond between LIN and the plaintiff should take precedence over LIN's bond with her siblings (see paras 31, 36, 41–42 & 45–46).
- B (4) During the proceedings, it was revealed that both VIN and HIN expressed a clear and consistent preference to remain with the defendant, and consequently, the plaintiff agreed to allow VIN and HIN to stay with the defendant. This agreement resolved the custody issue for two of the three children without further contention. The court opined that a judge's interview with a child should be considered as a last resort.
- C The court was mindful that in making an order for custody, the court shall have regard to the wishes of the child, nonetheless, judges were not obligated to conduct interviews with children. In the present case, LIN was only four years old at the material time, and the court found that interviewing her would be unnecessary and inadvisable due to her young age. Moreover, the court had already obtained ample information from
- D other sources (see paras 48–51, 57 & 59).
- E (5) In the final analysis, based on the affidavits and exhibits adduced, there was no evidence indicating that the plaintiff was an unfit parent. On the contrary, the evidence demonstrated that the plaintiff had always been actively involved in the children's lives. The records showed consistent care and engagement from the plaintiff, reinforcing her capability as a responsible parent. However, the court found that the acrimony between the parties would impede constructive communication, making it difficult to make joint decisions regarding the children's upbringing, education, healthcare, and other important matters. As
- F such, the court decided that the plaintiff should have sole custody, care, and control of LIN, while the defendant was to have sole custody, care, and control of VIN and HIN (see paras 60–62 & 64).
- G (6) It was essential to recognise the right of the children to maintain a strong bond with both parties as parent, even if the parents were separated. This right was crucial for the children's emotional and psychological well-being. The involvement of both parties in the child's life would provide diverse perspectives, emotional support, and a sense of balance, fostering a more holistic upbringing. Hence, unsupervised and
- H overnight access to the children by both parties was crucial (see para 65).
- I (7) The duty of parents to financially maintain children was provided in ss 92 and 93 of the LRA. In the present case, the court took the view that each party would be financially responsible for the child or children for whom they had been granted custody. It was unnecessary for the plaintiff to receive child maintenance from the defendant, as the defendant would be financially responsible for VIN and HIN. Additionally, the plaintiff was employed and financially independent, thus capable of maintaining LIN on her own. This arrangement ensured

that each parent supported the children under their custody, promoting financial responsibility and independence for both parties (see paras 73–75).

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[Bahasa Malaysia summary]

Plaintif-isteri dan defendan-suami telah berkahwin pada 2006 dan dikurniakan tiga orang cahaya mata iaitu dua orang anak lelaki, VIN dan HIN serta seorang anak perempuan, LIN. Perkahwinan tersebut, bagaimanapun, menjadi semakin teruk yang membawa kepada perebutan hak jagaan antara pihak-pihak serta beberapa permohonan yang difailkan oleh defendan. Defendan berjaya mendapatkan perintah mahkamah untuk jagaan, peliharaan dan kawalan anak-anak tersebut tetapi perintah tersebut telah diketepikan kerana kertas-kertas kausa tidak diserahkan kepada plaintif. Anak-anak tersebut bagaimanapun tidak dikembalikan kepada plaintif dan kekal dalam peliharaan dan kawalan defendan. Plaintif kemudiannya memfailkan permohonan untuk hak jagaan, peliharaan dan kawalan tunggal ke atas anak bongsu hasil daripada perkahwinan tersebut; dan permohonan agar anak pertama dan kedua untuk ditemu bual oleh mahkamah untuk memastikan kehendak mereka mengenai hak jagaan dan akses. Defendan, sebaliknya, menuntut balas untuk hak jagaan, peliharaan dan kawalan tunggal ke atas anak kedua dan ketiga perkahwinan tersebut. Di samping itu, defendan memfailkan permohonan di bawah s 100 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('AMUPP') untuk plaintif menjalani penilaian psikiatri dan rawatan yang diperlukan sebelum mahkamah membuat keputusan mengenai isu hak jagaan dan akses kepada anak-anak tersebut dalam permohonan-permohonan dan tuntutan balas tersebut. Isu-isu yang perlu diputuskan oleh mahkamah ialah: (a) sama ada defendan telah menyangkal anggapan dalam s 88(3) LRA — berhubung isu ini, defendan berhujah: (1) bahawa kesejahteraan mental dan emosi plaintif yang terjejas menyebabkan dia tidak layak untuk mengambil alih jagaan, peliharaan, kawalan, atau akses tanpa pengawasan kepada anak-anak tersebut; dan (2) bahawa, berkenaan dengan persekitaran semasa LIN, defendan menentang sekeras-kerasnya terhadap apa-apa gangguan ke atasnya, dengan alasan bahawa mengeluarkan dan mengasingkan LIN daripada adik-beradiknya bukanlah kepentingan terbaik untuk kebajikannya; (b) sama ada anak-anak tersebut sepatutnya ditemu bual; (c) sama ada pihak-pihak sepatutnya mempunyai hak jagaan tunggal atau bersama anak-anak tersebut; (d) sama ada pihak-pihak berhak untuk mendapat akses kepada anak-anak tersebut; dan (e) sama ada nafkah anak-anak patut diberikan.

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Diputuskan:

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- (1) Memandangkan LIN baru berusia empat tahun semasa perbicaraan, doktrin 'tender years' adalah terpakai. Prinsip undang-undang ini, yang sekian lama digunakan dalam kes jagaan, menegaskan bahawa

- A kanak-kanak kecil, terutamanya mereka yang masih mentah, sebaiknya dipelihara oleh ibu mereka. Doktrin ini telah digariskan dalam s 88(3) AMUPP. Adalah menjadi tanggungjawab defendan untuk menyangkal, atasimbangan kebarangkalian, anggapan dalam s 88(3) yang sememangnya memihak kepada plaintif. Anggapan undang-undang ini meletakkan beban ke atas defendan untuk memberikan keterangan yang kukuh untuk menentang anggapan bahawa plaintif adalah penjaga yang paling sesuai untuk LIN (lihat perenggan 15 & 20).
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- C (2) Laporan psikiatri plaintif menunjukkan bahawa plaintif adalah normal, dan dia tidak mengalami apa-apa penyakit mental atau emosi. Selanjutnya, laporan berkaitan LIN menunjukkan bahawa, bertentangan dengan dakwaan defendan, LIN mempunyai hubungan yang positif dan sihat dengan plaintif. Hubungan positif ini penting untuk perkembangan dan kesihatan mental LIN secara keseluruhan.
- D Oleh itu, keterangan yang ada menyokong kuat kesimpulan bahawa plaintif mampu memupuk suasana yang sihat dan menyokong bagi LIN (lihat perenggan 23 & 28–29).
- E (3) Tidak dinafikan bahawa kebajikan kanak-kanak tetap menjadi pertimbangan utama mahkamah. Keperluan asas ini telah termaktub bukan sahaja dalam s 11 Akta Penjagaan Kanak-Kanak 1961 tetapi juga dalam s 88(2) AMUPP. Mengenai persekitaran semasa LIN, disebabkan permasalahan yang berpanjangan dan pertikaian antara pihak-pihak, tidak boleh dikatakan bahawa LIN telah tinggal secara konsisten dengan defendan. Selanjutnya, mahkamah tidak seharusnya membenarkan defendan mendapat manfaat daripada kelewatan yang disebabkan olehnya sendiri dalam memfailkan permohonan dan tuntutan balas tersebut, dan tumpuan harus kekal pada kepentingan terbaik anak-anak tersebut, tanpa mengira keadaan semasa yang disebabkan oleh tindakan defendan. Mengenai pemisahan LIN daripada abang-abangnya, anak-anak tersebut akan menghabiskan banyak masa bersama-sama dalam tempoh akses yang diperuntukkan kepada setiap pihak oleh mahkamah. Pendekatan yang diambil oleh mahkamah mengimbangi keperluan untuk mengekalkan hubungan adik-beradik sambil menangani keadaan unik yang disebabkan oleh jurang umur yang agak besar antara LIN dan abang-abangnya. Akhirnya, mahkamah berpendapat bahawa, hubungan antara LIN dan plaintif harus diutamakan berbanding hubungan LIN dengan adik-beradiknya (lihat perenggan 31, 36, 41–42 & 45–46).
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- I (4) Semasa prosiding, didapati bahawa kedua-dua VIN dan HIN menyatakan kemahuan yang jelas dan konsisten untuk kekal bersama defendan, dan kesannya, plaintif bersetuju untuk membenarkan VIN dan HIN tinggal bersama defendan. Persetujuan ini menyelesaikan isu hak jagaan dua daripada tiga anak-anak tersebut tanpa pertikaian lanjut.

Mahkamah berpendapat bahawa temu bual hakim dengan seorang kanak-kanak harus dianggap sebagai pilihan terakhir. Mahkamah sedar bahawa dalam membuat perintah untuk jagaan, mahkamah hendaklah mengambil kira kehendak kanak-kanak tersebut, namun, hakim tidak diwajibkan untuk menjalankan temu bual dengan kanak-kanak. Dalam kes ini, LIN hanya berumur empat tahun pada masa yang material, dan mahkamah mendapati bahawa menemu bualnya adalah tidak perlu dan tidak wajar kerana usianya yang masih kecil. Tambahan pula, mahkamah telah pun mendapat maklumat yang mencukupi daripada sumber-sumber lain (lihat perenggan 48–51, 57 & 59).

- (5) Dalam analisis akhir, berdasarkan afidavit dan eksibit yang dikemukakan, tiada keterangan yang menunjukkan bahawa plaintif adalah seorang ibu yang tidak layak. Sebaliknya, keterangan menunjukkan bahawa plaintif sentiasa terlibat secara aktif dalam kehidupan anak-anak tersebut. Rekod-rekod menunjukkan peliharaan dan penglibatan yang konsisten daripada plaintif, mengukuhkan keupayaannya sebagai ibu yang bertanggungjawab. Walau bagaimanapun, mahkamah mendapati bahawa pertengkaran antara pihak-pihak akan menghalang komunikasi yang membina, menjadikannya sukar untuk membuat keputusan bersama mengenai asuhan, pendidikan, penjagaan kesihatan dan perkara-perkara penting lain anak-anak tersebut. Oleh itu, mahkamah memutuskan bahawa plaintif hendaklah mempunyai hak jagaan, peliharaan dan kawalan tunggal terhadap LIN, manakala defendan hendaklah mempunyai hak jagaan, peliharaan dan kawalan tunggal terhadap VIN dan HIN (lihat perenggan 60–62 & 64).
- (6) Adalah penting untuk mengiktiraf hak anak-anak untuk mengekalkan hubungan yang kukuh dengan kedua-dua pihak sebagai ibu bapa, walaupun ibu bapa telah berpisah. Hak ini adalah penting untuk kesejahteraan emosi dan psikologi anak-anak tersebut. Penglibatan kedua-dua pihak dalam kehidupan anak-anak tersebut akan memberikan perspektif yang pelbagai, sokongan emosi, dan rasa keseimbangan yang akan memupuk didikan yang lebih holistik. Oleh itu, akses bermalam dan tanpa pengawasan ke atas anak-anak tersebut oleh kedua-dua pihak adalah penting (lihat perenggan 65).
- (7) Kewajipan ibu bapa untuk menanggung nafkah anak-anak dari segi kewangan diperuntukkan dalam ss 92 dan 93 AMUPP. Dalam kes ini, mahkamah berpandangan bahawa setiap pihak akan bertanggungjawab dari segi kewangan ke atas anak atau anak-anak yang telah diberikan hak jagaan kepada mereka. Adalah tidak perlu bagi plaintif untuk menerima nafkah anak daripada defendan, kerana defendan akan bertanggungjawab dari segi kewangan untuk VIN dan HIN. Selain itu, plaintif telah bekerja dan bebas dari segi kewangan, dengan itu mampu

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- A** menafkahi LIN secara sendirian. Pengaturan ini memastikan bahawa setiap ibu bapa memberikan sokongan kepada anak-anak di bawah jagaan mereka, menggalakkan tanggungjawab dan kebebasan kewangan untuk kedua-dua pihak (lihat perenggan 73–75).]
- B Cases referred to**
Baheerathy al/p Arumugam v V Gunaselan all V Visvanathan [2012] 6 MLJ 868; [2013] 1 CLJ 954, HC (refd)
Diana Clarice Chan Chiing Hua v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 1 CLJ 721; [2002] 2 AMR 1527, CA (refd)
- C** *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770; [2003] CLJU 440; [2003] 4 CLJ 539; [2003] 6 AMR 459, HC (refd)
K Shanta Kumari v Vijayan [1986] 2 MLJ 216; [1985] CLJU 135; [1985] 1 LNS 135 (refd)
- D** *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ Rep 182, FC (refd)
Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor [2014] 9 MLJ 449; [2013] CLJU 1090; [2013] 1 LNS 1090, CA (refd)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (folld)
- E** *Sivajothi al/p K Suppiah v Kunathasan all Chelliah* [2006] 3 MLJ 184; [2000] 3 CLJ 175, HC (folld)
Tan Erh Ling v Ong Khong Wooi [2021] MLJU 1583; [2021] 1 LNS 1325, HC (refd)
- F** *Tan Sherry (P) v Soo Sheng Fatt (L)* [2016] MLJU 1264; [2016] 1 LNS 1586, HC (refd)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20; [1987] 1 LNS 77, HC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68, PC (refd)
- G** *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; [1977] CLJU 138; [1977] 1 LNS 138, FC (refd)
WKM v WKN [2024] 1 SLR 158; [2024] SGCA 1, CA (folld)
Yong May Inn v Sia Kuan Seng [1971] 1 MLJ 280; [1970] 1 LNS 176 (refd)
- H Legislation referred to**
Guardianship of Infants Act 1961 s 11
Law Reform (Marriage and Divorce) Act 1976 ss 88(2), (2)(b), (3), 92, 100
- I** *HB Chuah (Tan Chuah Shuaib & Co) for the plaintiff.*
Chris Chin (with Tan Han Rui) (Shang & Co) for the defendant.

Evrol Mariette Peters J:

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INTRODUCTION

[1] The primary reliefs sought by the plaintiff-wife in her applications in both encls 1 and 4 ('the applications') were for sole custody, care, and control of the youngest child of the marriage; and for the first and second children to be interviewed by this court to ascertain their wishes regarding custody and access.

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[2] In his affidavit in reply to the plaintiff's affidavits in support of the applications, the defendant-husband counterclaimed ('the counterclaim') against the plaintiff, seeking, among other things, sole custody, care, and control of the second and third children of the marriage. Additionally, the defendant requested that the plaintiff undergo a psychiatric evaluation and the necessary treatment before the court arrived at a decision on the issues of custody of and access to the children in the applications and counterclaim.

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[3] Due to the privacy concerns of the parties involved in the applications and counterclaim and sensitivity of the issues at hand, the plaintiff and defendant have been anonymised as NAH and HAH, respectively. The children of the marriage have been anonymised as VIN, HIN, and LIN.

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THE FACTUAL BACKGROUND

[4] The plaintiff and defendant (collectively 'the parties') were married in 2006 and had three children, namely two sons VIN, HIN, and a daughter LIN, born respectively in 2008, 2010, and 2019 (collectively 'the children').

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[5] The marriage progressively deteriorated until March 2021, when the defendant left the matrimonial home ('the matrimonial home'), leaving the children behind in the care and control of the plaintiff.

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[6] In 2021, a contentious custody battle began between the plaintiff and defendant, resulting in multiple applications being filed by the defendant vide No WA-24F-177-05 of 2021. However, the court orders obtained by the defendant granting him custody, care, and control of the children, were eventually set aside in April 2022 due to non-service of the cause papers on the plaintiff.

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[7] The children, however, were not returned to the plaintiff and remained in the care and control of the defendant. In April 2022, the plaintiff had initiated legal proceedings against the defendant by filing the applications for custody, care, and control of children, or at least access to VIN and HIN.

- A** [8] The defendant, however, insisted that the plaintiff and children should undergo an evaluation to assess their mental health. As such, the defendant filed an application in encl 24, which sought a psychiatric evaluation and treatment, if deemed necessary, for the plaintiff, before the court arrived at a decision on the issues of custody of and access to the children in the applications and counterclaim.
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[9] Pursuant to the application in encl 24, in October 2022, the court ordered the following, namely, that:

- C** (a) both parties and children shall be referred to a psychologist for an assessment and treatment, if necessary;
- (b) Jabatan Kebajikan Malaysia ('JKM') shall provide a report after the parties and children have been assessed; and
- D** (c) encls 1 and 4 shall only be disposed of after reports from the psychologist and JKJ are provided to the court.

[10] The following reports were produced as follows:

- E** (a) Laporan Perubatan (Jabatan Psikiatri dan Kesihatan Mental) dated September 2023 pertaining to the plaintiff;
- (b) Laporan Perubatan (Jabatan Psikiatri dan Kesihatan Mental) dated October 2023 pertaining to the defendant; and
- F** (c) Laporan Perubatan (Hospital Wanita dan Kanak-Kanak) dated November 2023 pertaining individually to the children.

THE ISSUES

- G** [11] The primary issue before the court was whether the plaintiff was entitled to custody, care, and control of LIN, considering that LIN was only two years old at the time when the applications and counterclaim were filed, and four when they were heard.

- H** [12] A subsequent issue was whether the children should be interviewed plaintiff was not seeking custody, care, and control of VIN and HIN, interviewing them was rendered irrelevant. Therefore, the issue that remained was whether only LIN should be interviewed to determine which parent
- I** should have custody, care, and control of her.

[13] Additionally, the court was required to decide if the defendant should be ordered to pay child maintenance, in the event that the plaintiff is awarded custody, care, and control of LIN.

[14] The applications and counterclaim were decided in the following manner, namely, that the plaintiff would have sole custody, care, and control of LIN, whilst VIN and HIN were placed in the sole custody, care, and control of the defendant. Both the plaintiff and defendant were granted access to the child(ren) who were not in their custody. No child maintenance was awarded to the plaintiff for LIN, as both parties would be responsible for financially providing for the child(ren) in their respective custody, care, and control.

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CONTENTIONS, EVALUATION, AND FINDINGS

Whether defendant had rebutted presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976

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[15] Given that LIN was only four years old at the time of the hearing, the doctrine of ‘tender years’ was applicable. This legal principle, historically used in custody cases, asserts that young children, particularly those of tender years, are best cared for by their mothers. It is based on the belief that mothers are naturally better suited to meet the needs of young children, especially during their formative years. This doctrine is outlined in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 (‘the Law Reform (Marriage and Divorce) Act’) which reads:

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Section 88 — *Power for court to make order for custody*

...

(3) There shall be a rebuttable presumption that it is for the good of a *child below the age of seven years to be with his or her mother* but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. (Emphasis added.)

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[16] The doctrine of ‘tender years’ has been elucidated in numerous cases including *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216; [1985] CLJU 135; [1985] 1 LNS 135, *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770; [2003] CLJU 440; [2003] 1 LNS 440, and *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; [1977] CLJU 138; [1977] 1 LNS 138. These cases assert that, when dealing with a very young child, it is in the child’s best interest to be with the mother.

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[17] In *Teh Eng Kim v Yew Peng Siong*, Raja Azlan Shah FCJ (as he then was) explained the relationship between a young child and the mother in the following passage:

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The youngest child, Bernard, is of tender years. In my opinion, his place right now is with the mother. ‘*No thing, and no person, said Sir John Romilly MR, in the case of Austin v Austin* [1865] 35 Beav 259; 263 ‘*and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the*

- A *welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place ...*. This view has found judicial favour in many jurisdictions: in Australia, for example, in *Kades v Kades*,⁽⁴⁾ the High Court, in a joint judgment stated: ‘What is left is the strong presumption which is not one of law but is founded on experience and upon the
- B *nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child’s mother and that her upbringing should be the responsibility of her mother*, if it is not possible to have the responsibility of both parents living together’. In Canada, Muloch CJ in *Re Orr* [1973] 2 DLR 77 commented that, ‘In the case of a father and mother living apart and each claiming the custody of a child, the
- C general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ...’ (Emphasis added.)
- D [18] In the case at hand, the consideration of LIN being of ‘tender years’ prompted a reference to the legal precedent set in *Yong May Inn v Sia Kuan Seng* [1971] 1 MLJ 280; [1970] 1 LNS 176. This case, presided over by Sharma J, involved the custody dispute of three children. In the following
- E passage, Sharma J granted custody of the children to their mother and expressed a notable opinion regarding the tender age of the children:
- F ... The children are all girls and although it is not absolutely essential that they should remain in the custody and care of their mother, they are bound to *feel freer in her company than in the company of their father* and more particularly so *when one of them is reaching an age when she may need the advice of her mother most*. (Emphasis added.)
- G [19] The reality is that we live in a world where the comfort level in discussing certain delicate issues is often influenced by the gender of the confidante. When it comes to navigating the complexities of puberty, a young girl will naturally gravitate towards her mother. This inclination is rooted in the shared experiences and understanding that can make these conversations more open and effective. Consequently, the plaintiff, as a mother, is inherently better positioned to understand and cater to LIN’s evolving needs. This unique maternal connection enables the plaintiff to provide the essential emotional
- H support and guidance that LIN requires as she matures.
- I [20] Thus, it was incumbent upon the defendant to rebut, on a balance of probabilities, the presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act, which inherently favoured the plaintiff. This legal presumption placed the burden on the defendant to provide compelling evidence to counter the assumption that the plaintiff was the most suitable guardian for LIN. Specifically, the defendant needed to demonstrate the plaintiff’s unsuitability as a mother, proving that her custody would not serve LIN’s best interests. This involved adducing clear and convincing evidence that would override the

statutory presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act, ultimately showing that LIN's welfare and development would be better served under alternative custodial arrangements.

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[21] The crux of the defendant's argument centred on the assertion that the plaintiff's compromised mental and emotional well-being rendered her unfit to assume custody, care, control, or even unsupervised access to the children. The defendant contended that the plaintiff's current state posed significant risks to the children's safety and well-being. Therefore, until the plaintiff received appropriate treatment and demonstrated substantial improvement, she should not be entrusted with the children's care. This argument aimed to highlight the urgency of addressing the plaintiff's health issues to ensure a stable and nurturing environment for the children.

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[22] Consequently, the defendant filed encl 24 under s 100 of the Law Reform (Marriage and Divorce) Act, requesting that the plaintiff undergo psychiatric evaluation and treatment, if necessary, before the court arrives at a decision regarding the applications and counterclaim. The provision reads:

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Section 100 — Court to have regard to advice of welfare officers, etc

When considering any question relating to the custody or maintenance of any child, *the court shall, whenever it is practicable, take the advice of some person*, whether or not a public officer, *who is trained or experienced in child welfare* but shall not be bound to follow such advice. (Emphasis added.)

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[23] After reviewing the psychiatric report dated 22 September 2023 concerning the plaintiff, it was evident that she was not suffering from any mental or emotional illness. The report confirmed that the plaintiff was perfectly normal, although understandably concerned about the well-being of the children. In my opinion, this concern was entirely justifiable, particularly given that HIN was born with an imperforate anus and had to undergo multiple surgeries in the early years. For example, due to HIN's medical condition, the plaintiff became especially vigilant about maintaining hygiene standards for all family members and expressed concerns regarding the defendant's lack of hygiene. Such worry and anxiety were legitimate and directly related to her child's health needs, yet these had been unfairly misconstrued by the defendant as indicators of mental instability on the plaintiff's part.

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[24] In any event, the plaintiff vehemently disputed the allegations made by the defendant. She asserted that the defendant had grossly exaggerated and embellished his claims regarding her behaviour. The defendant had accused the plaintiff of having Obsessive-Compulsive Disorder (OCD), thereby suggesting she suffered from significant mental and emotional issues. However, the plaintiff contended that these accusations were unfounded and misrepresented

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A her actions. In a nutshell, she maintained that her heightened attention to cleanliness and organisation, particularly in light of HIN's medical condition, was reasonable and should not be pathologised. By portraying her legitimate concerns and carefulness as symptoms of a mental disorder, the defendant was attempting to unfairly undermine her credibility and fitness as a parent.

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[25] As such, based on the cases of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721; [2002] 2 AMR 1527 and *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770; [2003] CLJU 440; [2003] 4 CLJ 539; [2003] 6 AMR 459, in light of conflicting accounts that have not been subjected to the rigorous processes of cross-examination and re-examination, which would occur in a full trial with viva voce evidence, the court's duty was to disregard the disputed facts. Instead, the court was obligated to base its decision solely on the undisputed facts.

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[26] This crucial aspect of civil litigation practice has been eloquently summarised by Lord Templeman for the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68, in the following words:

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At the end of the day the judge must decide the petition on the evidence before him. *If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations.* The judge must then decide the fate of the petition by consideration of the undisputed facts. (Emphasis

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added.)

[27] The defendant further asserted that LIN had developed a fear of the plaintiff due to her behaviour and conduct. He argued that this fear indicated a hostile and potentially harmful environment for LIN, thereby making it contrary to her best interests to be uprooted from her current, presumably more stable and nurturing, environment. The defendant emphasised that maintaining LIN in her existing surroundings was crucial for her emotional and psychological well-being. Additionally, the defendant insisted that LIN should be interviewed by the court to provide her perspective directly. He believed that a first-hand account from LIN would offer valuable insight into her true feelings and preferences, ensuring that the court had a comprehensive understanding of her welfare and best interests before making any custodial decisions.

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I [28] In my view, the defendant's claim that LIN feared the plaintiff was unsubstantiated. Upon a thorough review of the report dated December 2023 pertaining to LIN ('report pertaining to LIN'), it became evident that LIN maintained a positive and healthy relationship with the plaintiff. Throughout numerous observed interactions, the report pertaining to LIN indicated that

LIN displayed no signs of discomfort or distress in the plaintiff's presence. On the contrary, she appeared happy and relaxed, indicating a strong sense of security and contentment. These observations in the report pertaining to LIN were consistent and reliable, painting a clear picture of a nurturing and supportive bond between LIN and the plaintiff. LIN's demeanour and behaviour during these interactions suggested that she felt safe and well-cared-for, which are critical indicators of emotional well-being and stability.

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[29] In my view, this positive relationship between LIN and the plaintiff was crucial for LIN's development and overall mental health. The affectionate and stable environment provided by the plaintiff will undoubtedly contribute to LIN's emotional growth and resilience, countering any assertions made by the defendant regarding the plaintiff's suitability as a caregiver. Thus, the evidence strongly supported the conclusion that the plaintiff is capable of fostering a healthy and supportive atmosphere for LIN.

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[30] With regard to LIN's current environment, the defendant strongly argued against any disruption, contending that uprooting LIN and separating her from her siblings would not be in the best interest of her welfare.

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[31] There was no doubt that the welfare of the children remained the paramount consideration for this court. In fact, prioritising the welfare of the children in the court's deliberations serves as the 'golden thread' woven throughout all proceedings. This fundamental requirement is enshrined not only in s 11 of the Guardianship of Infants Act 1961 but also in s 88(2) of the Law Reform (Marriage and Divorce) Act. Both statutes mandate that the welfare of the child must be the foremost concern in any judicial decision regarding their care, custody, and upbringing. The sections read:

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Guardianship of Infants Act 1961

Section 11 — Matters to be considered

The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily *to the welfare of the infant* and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

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Law Reform (Marriage and Divorce) Act 1976

Section 88 — *Power of court to make order for custody*

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(2) In deciding in whose custody a child should be placed *the paramount consideration shall be the welfare of the child* and subject to this the court shall have regard ... (Emphasis added.)

- A [32] At this juncture, it was crucial to develop a comprehensive understanding of the term ‘welfare of the child,’ as extensively referenced in numerous legal precedents, including *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; [1977] CLJU 138; [1977] 1 LNS 138, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ Rep 182, *Tan Sherry (P) v Soo Sheng Fatt (L)* [2016] MLJU 1264; [2016] 1 LNS 1586, and *Tan Erh Ling v Ong Khong Wooi* [2021] MLJU 1583; [2021] 1 LNS 1325.
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- C [33] I was also guided by the Federal Court in *Sean O’Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, which referenced the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20; [1987] 1 LNS 77. In this case, Chan Sek Keong JC (as he then was) elucidated the expression ‘welfare of the child’ in the following passage:
- D The expression ‘welfare’... is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms. (Emphasis added.)
- E [34] The Federal Court in *Sean O’Casey Patterson v Chan Hoong Poh & Ors*, through the opinion of James Foong FCJ, proceeded to explain ‘welfare of the child’ in the following passage:
- F [53] According to *Halsbury’s Laws of England* (4th Ed, Reissue) (Mackay Edition), para 443 the term, ‘welfare principle’ is a set of factors used when ‘a court determines any question with respect to the upbringing of a child or the administration of a child’s property or the application of any income arising from it, the child’s welfare must be the court’s paramount consideration’. In the English children Act 1989, under the heading ‘welfare of the child’ is a set of factors that must be taken into account when deciding on such cases. *These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved.* Thus, this term ‘welfare principle’ relates to certain factors to be considered and their priority during deliberation in such cases. (Emphasis added.)
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- H [35] To reach a well-informed decision, the court meticulously examined the concept of the ‘welfare of the child’ in its broadest context. This involved considering all relevant factors and judiciously balancing them. Due to the unique circumstances of each case, it was not feasible to provide an exhaustive list of specific considerations.
- I [36] Regarding the status quo of LIN’s environment, it could not be stated that she had been consistently residing with the defendant. This uncertainty stemmed from the prolonged and contentious dispute between the parties over the custody of the children since their marriage broke down in March 2021.

The breakdown of their marriage initiated a series of legal battles, characterised by a tug-of-war over custody arrangements. Following the separation, the defendant filed several applications, *vide* WA-24F-177-05 of 2021, seeking custody of the children. These legal actions were met with responses and counterclaims from the plaintiff, highlighting the intense and ongoing nature of their custody conflict. Throughout this period, LIN's living situation remained in flux due to the lack of a stable, agreed-upon arrangement.

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[37] Ultimately, the court orders that were obtained through the defendant's applications *vide* WA-24F-177-05 of 2021 were set aside. This development further underscored the instability of LIN's current environment and the lack of a clear custodial arrangement favouring the defendant. Consequently, LIN's living situation cannot be conclusively attributed to the defendant, as the legal and familial context reflected a highly dynamic and unsettled environment for the children. This ongoing instability highlighted the need for a more definitive and consistent custodial resolution that prioritised LIN's welfare and provided her with the necessary stability and security.

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[38] I also noted that the applications were initially filed as early as April 2022. However, the defendant did not appoint his solicitors until June 2022. Following this, he proceeded to file his affidavit in reply, which included the counterclaim, along with additional affidavits, in July and August 2022. In these filings, the defendant insisted that the plaintiff was suffering from mental and emotional issues and requested a psychiatric evaluation for her, filing an application in encl 24 in September 2022.

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[39] The psychiatric reports on the mental health of both parties and the children were subsequently submitted to the court between September 2023 and January 2024. Dissatisfied with the findings of these reports, the defendant attempted to file further affidavits. However, this attempt was not permitted by the court. Consequently, the hearing resumed in February 2024, and the decision was delivered in March 2024.

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[40] This timeline highlights the protracted nature of the proceedings and the defendant's persistent efforts to challenge the plaintiff's mental fitness. Despite the extensive delays and the defendant's multiple filings, the court maintained a clear focus on assessing the situation based on the evidence presented within the established legal framework, ultimately arriving at a decision in March 2024.

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[41] In my view, it was the defendant who caused the delay in hearing the applications and counterclaim by making various allegations against the plaintiff, particularly claiming she was an unfit mother suffering from mental and emotional issues — allegations that ultimately proved to be baseless. By

A creating the very environment he now sought to protect, the defendant's argument against changing the children's living situation lacked merit and failed to acknowledge his role in the protracted legal conflict. Given these circumstances, it was untenable and injudicious for the defendant to now use this lapse of time against the plaintiff, arguing that the court should not remove the children from their current environment.

[42] Therefore, the court should not allow the defendant to benefit from the delay he caused, and the focus should remain on the best interests of the children, irrespective of the current circumstances shaped by the defendant's actions.

[43] Regarding the separation of LIN from her brothers, I am mindful of the judicial precedent that courts generally do not favour separating siblings. This principle is supported by several cases, such as *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184; [2000] 3 CLJ 175 and *Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor* [2014] 9 MLJ 449; [2013] CLJU 1090; [2013] 1 LNS 1090. These cases highlight the reluctance of the courts to disrupt the sibling bond, recognising the importance of maintaining their relationship.

[44] In my view, this principle is not a hard and fast rule. In the present case, the child in question, LIN, is a four-year-old girl, whereas her siblings are 14 and 16-year-old boys. There is a significant age gap of more than ten years between LIN and her brothers. In contrast, the cases cited above involved siblings with much closer age gaps. For instance, in *Sivajothi K Suppiah v Kunathasan a/l Chelliah*, the age gaps between the three children were two and three years, and in *Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor*, the gap between the two children was only three years. This substantial difference in ages in the present case suggests that the circumstances are quite distinct and may warrant a different consideration regarding the separation of siblings.

[45] In any event, the children will spend significant amounts of time together during the access periods allocated to each party. This arrangement would ensure that the siblings will continue to maintain their bond and spend quality time together, even if they were not living in the same household. This was further detailed in my explanation below regarding the access schedules for each party. This approach balances the need to keep the siblings connected while addressing the unique circumstances presented by the considerable age gap between LIN and her brothers.

[46] Last but not least, the bond between LIN and the plaintiff should take precedence over her bond with her siblings. While sibling relationships are

undoubtedly important, the primary bond between a young child and their primary caregiver, particularly the plaintiff in this case, is crucial for the LIN's development and emotional well-being. LIN's brothers, VIN and HIN, being 14 and 16 years old, are at different developmental stages with their own social and academic engagements. Although their interaction and relationship with LIN are important, they cannot substitute the constant and attentive care that the plaintiff, as her mother, would provide.

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Whether children should have been interviewed

[47] One key issue addressed by this court was whether LIN should have been interviewed by the judge, as requested by the parties. Initially, the parties requested that all three children be interviewed to understand their preferences and perspectives regarding custody arrangements. This approach was intended to ensure that the children's voices were heard and that the best interests of their welfare were taken into account.

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[48] However, during the proceedings, it was revealed that both VIN and HIN expressed a clear and consistent preference to remain with the defendant. This information was significant because it directly impacted the plaintiff's stance on the custody arrangements. Recognising the importance of the children's wishes and prioritising their emotional and psychological well-being, the plaintiff agreed to allow VIN and HIN to stay with the defendant. This agreement was a crucial development in the case, as it resolved the custody issue for two of the three children without further contention.

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[49] Despite this resolution regarding VIN and HIN, the defendant insisted that LIN also be interviewed by the judge. However, this insistence was deemed unnecessary for the following reasons.

[50] In making an order for custody, I am mindful that the court shall have regard to the wishes of the child, pursuant to s 88(2)(b) of the Law Reform (Marriage and Divorce) Act, which reads:

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Section 88 — *Power of court to make order for custody*

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(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —

(a) to the wishes of the parents of the child; and

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(b) *to the wishes of the child*, where he or she is of an age to express an independent opinion. ... (Emphasis added.)

[51] Nevertheless, it is important to note that judges are not obligated to

A conduct interviews with children. The decision to forgo interviewing children can be appropriate, depending on the unique circumstances of each case. It was crucial to recognise the inherent limitations and potential drawbacks of interviewing children. In my view, a judge's interview with a child should be considered a last resort due to several compelling reasons.

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[52] First and foremost, the direct involvement of a child in legal proceedings can be highly stressful and intimidating. Regardless of efforts to create an informal and child-friendly environment, the inherent seriousness of the proceedings can induce anxiety, fear, and emotional distress in a child. The formal setting of a courtroom or judge's chambers, combined with the gravity of the situation, may overwhelm a child.

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[53] Secondly, children may feel pressured to say what they think the judge or their parents want to hear. This pressure can result in responses that do not genuinely reflect their own wishes or feelings. Additionally, at the age of four, children often lack the vocabulary or emotional maturity to accurately articulate their thoughts and preferences, leading to potential misunderstandings or misinterpretations of their true desires.

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[54] Thirdly, shielding children from the complexities and conflicts of legal disputes helps protect their innocence and allows them to maintain a sense of normalcy in their lives, despite the ongoing proceedings. Keeping children away from these adversarial situations helps preserve their emotional well-being and stability.

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[55] Lastly, judges can often obtain comprehensive and reliable information from parents, guardians, social workers, and solicitors. These individuals can provide valuable insights into the child's well-being and preferences without involving the child directly, ensuring that decisions are made with a full understanding of the child's situation while sparing the child from direct involvement in the legal process.

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[56] In reference to this, I sought guidance from a recent case by the Singapore Court of Appeal, namely *WKM v WKN* [2024] 1 SLR 158; [2024] SGCA 1. In delivering the court's decision, Debbie Ong Siew Ling JAD, underscored the following in her statement:

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[64] *The judicial interview should not become a step where the court takes a snapshot of an emotional position at a particular point in time and reaches a decision based on that momentary picture. Information obtained through other sources would enable the court to have a longitudinal view of the history of the case and a fuller understanding of the family's relationships and issues. (Emphasis added.)*

[57] In the present case, LIN was only four years old at the material time, and I found that interviewing her would be unnecessary and inadvisable due to her young age. A

[58] The defendant had suggested that she be interviewed together with VIN and HIN present. I found no justification for doing so as introducing them into the interview of LIN could potentially confuse the issues and blur the distinction between LIN's situation and that of VIN and HIN. B

[59] Lastly and more importantly, I chose not to interview LIN because I had already obtained ample information from other sources, such as the evaluation report on the plaintiff as well as the report pertaining to LIN, ensuring a thorough and well-informed basis for my decision-making process. C

[60] In the final analysis, based on the affidavits and exhibits adduced, there was no evidence indicating that the plaintiff was an unfit parent. On the contrary, the evidence demonstrated that the plaintiff had always been actively involved in the children's lives. The records showed consistent care and engagement from the plaintiff, reinforcing her capability as a responsible parent. D
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[61] As such, I was inclined to award custody, care and control of LIN to the plaintiff, while VIN and HIN should remain with the defendant. The subsequent issue was whether the parties should have sole or joint custody of the children. F

[62] It is crucial to emphasise that joint guardianship and custody entail co-parenting, which requires open communication, compromise, and a focus on the child's needs. In this case, the acrimony between the plaintiff and defendant would impede constructive communication, making it difficult to make joint decisions regarding the children's upbringing, education, healthcare, and other important matters. Notably, in the case of *Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan* [2012] 6 MLJ 868; [2013] 1 CLJ 954, one of the reasons for granting custody, care, and control to one parent, was the acrimonious relationship between the parties. This precedent supports the decision to grant custody in situations where the relationship between parents is highly contentious. G
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[63] I was also guided by the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah*, where it was stated in the following paragraphs: I

(3) *The issue of joint custody was also considered but held to be inappropriate as an arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences, and living patterns. However, these difficulties are likely to be less when primary responsibility for the care of*

- A *the child rests with one parent rather than both.* Taking into consideration the above factors and the circumstances of the case, it was held to be in the best interest of the welfare of the children for them to continue to remain together in the custody of the plaintiff. Thus, the plaintiff was granted the sole and full custody, care and control of the children with reasonable access to the defendant. (Emphasis added.)
- B [64] I, therefore, decided that the plaintiff should have sole custody, care, and control of LIN, while the defendant was to have sole custody, care, and control of VIN and HIN
- C *Whether parties entitled to access to children*
- D [65] It was essential to recognise the right of the children to maintain a strong bond with both parties as parent, even if the parents are separated. This right was crucial for the children's emotional and psychological well-being. Regular and meaningful interactions with both parties would help the children feel secure, loved, and supported, despite the changes in family dynamics. Ensuring that the children can build and sustain these relationships promotes stability and continuity, which are essential for healthy development. The involvement of both parties in the child's life provides diverse perspectives, emotional support, and a sense of balance, fostering a more holistic upbringing. Hence unsupervised and overnight access to the children by both parties was crucial.
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- F [66] Since the plaintiff will have sole custody, care, and control of LIN, she will retain all important documents for LIN and may travel overseas with her, provided it does not interfere with the defendant's access time. The plaintiff must inform the defendant at least seven days in advance by providing the travel itinerary. Similarly, if the defendant wishes to travel overseas with LIN,
- G he must provide the plaintiff with the travel itinerary at least seven days in advance, after which the plaintiff must promptly surrender the relevant travel documents to the defendant.
- H [67] Given that the defendant has been granted sole custody, care, and control of VIN and HIN, he will retain all important documents for both children and is permitted to travel overseas with them, provided it does not interfere with the plaintiff's access time. The defendant must inform the plaintiff at least seven days in advance by providing the travel itinerary. Similarly, if the plaintiff wishes to travel overseas with VIN and HIN, she must provide the defendant with the travel itinerary at least seven days in advance, after which the defendant must promptly surrender the relevant travel documents to the plaintiff.
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[68] Since the plaintiff has been granted sole custody, care, and control of LIN, the defendant will have online access to LIN on Mondays, Wednesdays, and Fridays for a maximum of 30 minutes anytime between 7pm and 8pm. The plaintiff must facilitate these sessions allowed to join these online sessions. Likewise, since the defendant has been granted sole custody, care, and control of VIN and HIN, the plaintiff will have online access to them on Tuesdays and Thursdays for a maximum of 30 minutes anytime between 7pm and 8pm. The defendant must facilitate these sessions and must not interfere, interrupt, or frustrate them. LIN will be allowed to join these online sessions.

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[69] Each party will have overnight and unsupervised access to the child(ren) on alternate weekends from Friday at 7pm to Sunday at 7pm. Exceptions to this schedule are Mother's Day and Father's Day, during which all child(ren) will spend the day with the respective parent.

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[70] Each party will have overnight and unsupervised access to the child(ren) on alternate public holidays from 7pm on the eve of the holiday until 7pm on the last day of the holiday. If the public holiday extends over multiple days, the entire duration will be treated as a single block. The public holiday on 28 March 2024, will begin with the plaintiff.

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[71] For Chinese New Year, each party will alternate access to the child(ren) in two blocks:

- (a) Block 1: from 9am on Chinese New Year Eve to 9pm on Chinese New Year Day four; and
- (b) Block 2: from 9am on Chinese New Year Day 4 to 9pm on Chinese New Year Day nine.

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In 2025, Block 1 will be allocated to the plaintiff, and the parents will alternate these blocks on a yearly basis thereafter.

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[72] During school holidays lasting more than one week, the plaintiff will have access to VIN and HIN during the first half of the holidays, while the defendant will have access to LIN during the second half.

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[73] The duty of parents to financially maintain children is provided in ss 92 and 93 of the Law Reform (Marriage and Divorce) Act, both of which read:

Section 92 — Duty to maintain children

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Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by

- A** providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Section 93 — Power of court to order maintenance for children

- B** (1) The court may at any time order a man to pay maintenance for the benefit of his child —
- (a) if he has refused or neglected reasonably to provide for the child;
- (b) if he has deserted his wife and the child is in her charge;
- C** (c) during the pendency of any matrimonial proceedings; or
- (d) when making or subsequent to the making of an order placing the child in the custody of any other person.
- D** (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.
- (3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

- E** [74] Regarding the maintenance of the children, I took the view that each party will be financially responsible for the child or children for whom they have been granted custody. The plaintiff has been awarded sole custody, care, and control of LIN, while the defendant has been granted sole custody, care, and control of VIN and HIN. Consequently, it was unnecessary for the plaintiff to receive child maintenance from the defendant, as the defendant will be financially responsible for VIN and HIN.
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- G** [75] Additionally, the plaintiff is employed and financially independent, thus capable of maintaining LIN on her own. This arrangement ensures that each parent supports the children under their custody, promoting financial responsibility and independence for both parties.

- H** [76] I am compelled at this juncture to state that it was an irresistible inference that the defendant was bent on denying the plaintiff custody, or even access to the children. Despite allowing his application in encl 24 to have the mental health of the plaintiff and children evaluated, the defendant was not satisfied with the reports, and attempted unsuccessfully to further affidavits to dispute the contents of the reports.
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[77] I must note that it was evident the defendant was determined to deny the plaintiff both custody and access to the children. Despite the court granting his application in encl 24 to have the mental health of the plaintiff and children

evaluated, the defendant was dissatisfied with the reports. He made unsuccessful attempts to introduce further affidavits to dispute the content of these reports.

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[78] The defendant's actions suggest an intention to delay the hearing of the applications by filing encl 24. This strategy resulted in a significant delay of approximately two years, as the court had to wait for the submission of the reports. The defendant's conduct had not only impeded the judicial process but also extended the resolution of this matter unnecessarily, to the detriment of all parties involved.

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[79] The court had also suggested that both parties find some middle ground regarding the children, especially given that the evaluation reports indicated there was nothing wrong with the plaintiff. Additionally, the considerable time the plaintiff had been separated from LIN had to be taken into account. While the plaintiff conceded that the defendant should have custody, care, and control of VIN and HIN, the defendant refused to compromise, insisting that the plaintiff was unfit to have custody of any of the children.

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[80] In my view, the defendant had weaponised the children in his conflict with the plaintiff, and I took an extremely dim view of his conduct. His refusal to cooperate and meet halfway demonstrated a disregard for the best interests of the children and highlighted a troubling use of the custody dispute as a means to further his own agenda.

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[81] Parties involved in a matrimonial dispute must always remember that in family proceedings, there are no winners. Everyone loses, but the greatest loss is suffered by the children, who are deprived of their right to have a nurturing relationship with both parents. In this particular case, the children, especially LIN, have been especially deprived of a meaningful relationship with their mother. The proverb 'when elephants fight, it is the grass that gets trampled' aptly illustrates this situation. Just as the grass suffers under the weight of battling elephants, so too do the children suffer in the wake of their parents' conflicts, losing the essential bonds and stability they need from both parents.

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[82] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, the applications and counterclaim were decided in the following manner, namely, that the plaintiff would have sole custody, care, and control of the LIN whilst VIN and HIN were placed in the sole custody, care, and control of the defendant. Both the plaintiff and defendant were granted access to the children not in their custody. No maintenance was awarded to the plaintiff for child

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A maintenance for LIN as both plaintiff and defendant would be responsible for financially providing for the child(ren) in their respective custody.

Order accordingly.

B Reported by Dzulkarnain Ab Fatar

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